

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD J. FLEMING	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period May 28, 1996 through June 25, 1996.	:	DETERMINATION DTA NO. 816053

Petitioner, Edward J. Fleming, 4295 Persimmon Path, Liverpool, New York 13090-1933, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period May 28, 1996 through June 25, 1996.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 10, 1998 at 10:30 A.M., with all briefs to be submitted by June 2, 1998, which date began the six-month period for the issuance of this determination. Petitioner appeared by Roy W. Helmetag, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether petitioner's status, as a general manager and corporate officer, made him personally liable for prepaid sales taxes on cigarettes due from East Pittston Corp., a cigarette wholesaler and distributor.

II. Whether the Division of Taxation should be estopped from asserting personal liability against petitioner as a result of its erroneous acceptance of the termination notice of the bonding

company for East Pittston Corp., without first charging the sales tax at issue against the applicable bond.

III. Whether the Division of Taxation arbitrarily and erroneously credited 100% of the value of unused cigarette tax stamps against the cigarette tax liability of East Pittston Corp. instead of apportioning a share of such value to the corporation's liability for prepaid sales tax.

FINDINGS OF FACT

1. Petitioner, Edward J. Fleming, was the general manager of East Pittston Corp. (doing business as Mutual Candy Co.), a wholesale tobacco and candy distribution company, located in Auburn (Cayuga County) in the Finger Lakes region of New York. With approximately 10 employees, this tobacco and candy distributor had weekly sales of approximately \$100,000.00 to mostly, in petitioner's words, "mom and pop" retail stores (tr., p. 98). The company's largest account represented no more than \$4,000.00 in weekly sales with most accounts in the vicinity of \$800.00 to \$1,500.00 in weekly sales. At the time the company went out of business early in the summer of 1996, it had inventory on its books of over \$600,000.00 and \$300,000.00 in accounts receivable.

2. As a wholesaler of cigarettes selling to retailers, East Pittston Corp. held a license from the Department of Taxation and Finance ("Department") to act as a cigarette agent. In addition, East Pittston Corp., as a licensed cigarette agent, was permitted to pay for cigarette tax stamps within 30 days after the date of purchase rather than on a cash basis. The Department permitted East Pittston Corp. to purchase cigarette tax stamps on a credit basis because the company had filed a credit bond as required by the Department's regulations.¹ East Pittston Corp.'s credit

¹See 20 NYCRR 334.2(c)(1)(ii)(b).

bond dated August 3, 1995 bound National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as surety, for any default on the part of East Pittston Corp. in payment of (i) cigarette tax and (ii) prepaid sales tax on cigarettes under Tax Law Articles 20 and 28, respectively, up to the amount of the credit bond of \$195,000.00.

3. During the month of June 1996, East Pittston Corp. purchased or acquired 3,324,000 so-called 20s (packages of cigarettes containing 20 cigarettes) and 24,000 so-called 25s (packages of cigarettes containing 25 cigarettes) from 5 cigarette manufacturers as follows:

Cigarette Manufacturer	20s	25s
R.J. Reynolds	984,000	6,000
Philip Morris	1,308,000	12,000
Lorillard	510,000	6,000
Brown & Williamson	492,000	-0-
Liggett Meyers	30,000	-0-
Totals	3,324,000	24,000

4. During the month of June 1996, East Pittston Corp. purchased 180,000 cigarette tax stamps, with a face value of 70¢ (consisting of 56¢ for cigarette tax and 14¢ for prepaid sales tax) for 20 packs. These 180,000 cigarette tax stamps were purchased on credit by East Pittston Corp. in blocks of 30,000 as follows:

Order Date	Scheduled Payment Date	Number of cigarette stamps
June 5, 1996	July 5, 1996	30,000
June 10, 1996	July 10, 1996	30,000
June 13, 1996	July 12, 1996	30,000
June 18, 1996	July 18, 1996	30,000

June 21, 1996	July 19, 1996	30,000
June 25, 1996	July 25, 1996	30,000

In addition, East Pittston Corp. purchased 60,000 cigarette stamps, with a face value of 70¢ during the end of May 1996, on credit as follows:

Order Date	Scheduled Payment Date	Number of cigarette stamps
May 28, 1996	June 27, 1996	30,000
May 30, 1996	June 28, 1996	30,000

If the thirtieth day after the order date fell on a Saturday or Sunday, the due date for payment was the prior Friday. For example, the due date for payment of the cigarette stamps ordered on June 13, 1996 was Friday, July 12, 1996, the day before the thirtieth day which fell on Saturday, July 13, 1996.

5. As noted in Finding of Fact “1”, East Pittston Corp. went out of business in the early summer of 1996, and the cigarette tax stamps purchased on credit, as detailed above, were never paid for by the company. In total, East Pittston Corp. failed to make payment on 240,000 cigarette tax stamps purchased on credit. Since the cigarette tax stamps were in the face value of 70¢, consisting of 56¢ for cigarette tax and 14¢ for prepaid sales tax, the Division of Taxation (“Division”) determined that East Pittston Corp. was liable for unpaid cigarette tax of \$133,903.20 (240,000 multiplied by 56¢ equals \$134,400²) and for prepaid sales tax of \$33,600.00 (240,000 multiplied by 14¢ equals \$33,600.00).

²The record does not explain the \$496.80 difference between \$134,400.00 and the \$133,903.20 of cigarette tax determined due by the Division.

6. The Division issued two notices and demands for payment of tax due, each dated August 5, 1996, against East Pittston Corp. asserting (i) cigarette tax due of \$133,903.20 plus penalty and interest and (ii) sales tax due of \$33,600.00 plus penalty and interest. Three months later, the Division issued a Notice of Determination dated November 8, 1996 against petitioner as “an Officer/Responsible Person of: East Pittston Corp.” asserting sales tax due of \$33,600.00 plus penalty and interest.

7. East Pittston Corp. faced a liquidity problem in June of 1996. In the prior year, Marine Midland Bank (“Marine Midland”), which had provided a line of credit to the company, required the line of credit, in Mr. Fleming’s words, to be “termed out” (tr., p. 97) in a loan guaranteed by the Small Business Administration. In addition, the company’s loan account with Marine Midland was assigned to the bank’s collection unit because, according to Mr. Fleming, “[t]he tobacco industry as a whole is not doing fairly well” (tr., p. 97) including East Pittston Corp. Apparently, the company had problems meeting bank requirements concerning its prior line of credit, and Marine Midland was closely monitoring payments due on the replacement term loan. In June of 1996, East Pittston Corp. became past due on its term loan with Marine Midland in the amount of approximately \$3,500.00. Petitioner testified that the bank refused to accept late payment of this amount from the company. According to Mr. Fleming, Marine Midland’s “collection unit saw an opportunity to close the company and convert the assets to pay off the loan. And that is what happened” (tr., p. 97). Nonetheless, even as of the last day of operation of East Pittston Corp., Mr. Fleming was hopeful that he “was going to be able to straighten the matter out, because we had the money to pay them” (tr., p. 88).

8. East Pittston Corp. went out of business on June 28, 1996 as a result of Marine Midland’s foreclosure on its loan, which resulted in the bank’s seizure of the company’s assets.

Petitioner as general manager of the company was aware that East Pittston Corp. owed cigarette tax and sales tax in the amounts detailed in Finding of Fact “5”. Upon the company’s receipt in early August of 1996 of the notices and demands noted in Finding of Fact “6”, Mr. Fleming contacted the company’s surety, National Union Fire Insurance Company, to ensure that the company’s bond was still in place. The bond in the amount of \$195,000.00 was sufficient to cover the cigarette tax and sales tax amounts due from East Pittston Corp. In fact, the Division in its answer to Mr. Fleming’s petition has conceded that it “could have collected the sales tax at issue from the bonding company within thirty days of the date that the notice of termination was issued.”

9. However, the Division permitted the bond to be cancelled without charging liability for the sales tax at issue in this proceeding, as well as the cigarette tax due from East Pittston Corp. (which the Division has not sought from Mr. Fleming as an officer or responsible person of the company), against the surety bond. This failure was the result of a lack of adequate communication among certain offices within the Division and Fleet Bank’s Cigarette Tax Unit, which served as the Division’s agent in the sale of cigarette tax stamps.

10. East Pittston Corp., as a licensed cigarette agent, was required to advance and pay cigarette tax and sales tax by the purchase of cigarette stamps, which would then be affixed to individual packages of cigarettes it subsequently distributed to its various retail accounts. Fleet Bank served as the Division’s “agent bank . . . for the purpose of making authorized sales of such stamps to licensed cigarette agents” (20 NYCRR 334.2[b][3]). As noted in Finding of Fact “2”, East Pittston Corp. was authorized to purchase cigarette tax stamps on a credit basis because it had filed a credit bond with the Department. In addition, the company filed with the Department an “Authorization for Automated Clearing House (ACH) Debits” dated August 29, 1995, which

certified that the Department or its agent, i.e., Fleet Bank, “may debit, using established banking ACH procedures,” the company’s bank account. This form referenced a Fleet Bank account maintained by the company at a Fleet Bank branch location in Utica, New York. Either (i) petitioner, (ii) Thomas R. Backman, the warehouse supervisor for East Pittston Corp., or (iii) Edward J. Parker, Mr. Backman’s “backup . . . when he was on vacation or . . . ill” (tr., p. 94) would purchase cigarette stamps directly from Fleet Bank by telephone, and 30 days after the purchase by phone, the bank account of East Pittston Corp. would be debited. As noted in Finding of Fact “4”, there were eight purchases of cigarette stamps, for which payments of cigarette tax and sales tax were not made by the company. When Fleet Bank sought to debit the bank account of East Pittston Corp., 30 days after the respective dates on which telephone orders were made, there were insufficient funds in the company’s bank account to cover the cost of the cigarette stamps.

11. By a letter dated July 31, 1996, National Union Fire Insurance Company of Pittsburgh, Pennsylvania notified the Division’s Registration/Bond Unit that the credit bond for cigarette stamps of East Pittston Corp. was thereby cancelled effective September 1, 1996. In response, the Registration/Bond Unit by a letter dated August 9, 1996 contacted Fleet Bank’s Cigarette Tax Unit requesting that it “advise this office when all credit purchases covered by [the surety bond] have been paid-in-full.” The Registration Bond Unit was advised by Fleet Bank’s Cigarette Tax Unit in a letter dated September 6, 1996 that “East Pittston Candy, dba Mutual Candy has fulfilled all credit obligations on their bond . . . totaling \$195,000.” Consequently, by a letter dated September 11, 1996, the Registration/Bond Unit advised National Union Fire Insurance Company of Pittsburgh, Pennsylvania that it may “consider this letter as full cancellation and releasing you of all liability under [the credit bond].”

12. However, all purchases covered by the surety bond had not been paid in full as noted in Finding of Fact “5”. Apparently, at or about the time that the Audit Division issued the two notices and demands dated August 5, 1996 against East Pittston Corp., detailed in Finding of Fact “6”, it also advised Fleet Bank “to remove the amounts [for unpaid credit purchases] from their accounts receivable records” (tr., p. 61) because it had sent out an assessment.

13. As a result of the erroneous cancellation of the surety bond in this matter, the Division has recently adopted a new written procedure which requires the Registration/Bond Unit (i) to check the Division’s CARTS [computer] system for open assessments, and (ii) to obtain clearance from the Audit Division before a surety bond is cancelled.

14. Due to its failure to collect the outstanding taxes owed by East Pittston Corp. from the company’s surety, the Division subsequently sought payment of the sales tax at issue by the issuance of the Notice of Determination dated November 8, 1996 against petitioner as an officer or responsible person of East Pittston Corp.

15. Petitioner was the general manager of East Pittston Corp. as well as a corporate officer, i.e., secretary/treasurer. However, Mr. Fleming had no ownership interest in the corporation. Rather, the company’s president, Alexander Torre Tasso, had 100% ownership. As general manager, petitioner had overall responsibility for the company, which in Mr. Fleming’s words included “employees, buying, retailing, collection of receivables” (tr., p. 79). Petitioner “took care of all the paperwork to put the [surety] bond in place” (tr., p. 80) and was responsible for the purchase of cigarette stamps including authorizing the State of New York to make automatic withdrawals from the company’s bank account in payment of the cigarette stamps. At the time that the company’s operations ceased, Mr. Fleming knew that the surety bond was “in full force and effect” (tr., p. 81) so that the taxes at issue could be collected by the Division from

the surety. Even so, Mr. Fleming believed that the company had sufficient assets so that the taxes would be paid. However, the bank “sold the inventory for peanuts. . . . And . . . once you stop doing business with small accounts, it’s not uncommon not to be able to collect all of the account” (tr., p. 91).

16. When Marine Midland took over East Pittston Corp., the bank ascertained that the company’s assets included unused cigarette stamps in the amount of \$4,301.60, which formed the basis of a subsequent refund claim. The Division approved a refund claim in this amount and applied \$4,301.60 against the outstanding cigarette tax due of \$133,903.20, as noted in Finding of Fact “6”. The Division did not allocate any portion of the \$4,301.60 to the outstanding sales tax due of \$33,600.00 although a portion of the unused cigarette stamps represented the prepayment of sales tax in the amount of \$857.50. In addition, at the time Marine Midland took over the premises of East Pittston Corp., the company’s assets included cigarettes which had cigarette stamps affixed worth \$10,240.00.

17. Petitioner’s representative submitted 11 proposed findings of fact. Proposed findings of fact 3, 7, 8, 9, and 11 are accepted and incorporated into this decision.

Proposed finding of fact 1 is accepted, but it is also noted that Mr. Fleming was an officer of East Pittston Corp.

Proposed finding of fact 2 is accepted except to the extent that it is somewhat confusing with regard to the bank account of East Pittston Corp. which was subject to automatic withdrawals. The company’s bank account subject to automatic withdrawals, as noted in Finding of Fact “10”, was located at the Utica branch of Fleet Bank. Fleet Bank was also the Division’s “agent bank.”

Proposed finding of fact 4 is rejected in that the first order date for cigarette stamps was May 28, 1996 and the last was June 25, 1996 so that the period at issue runs from May 28, 1996 to June 25, 1996.

Proposed finding of fact 5 is accepted except the last day the company operated its business was June 28, 1996 not 1998, and except to the extent that it states that Mr. Fleming turned the keys to the building over to Marine Midland Bank on June 28, 1996. Mr. Fleming testified that he mailed the keys to the bank on that day, but the bank claimed they never received them, and he provided them with another set of keys at the building in early July.

Proposed finding of fact 6 is rejected. Payment for the earliest purchase on May 28, 1996 was due on June 27, 1996, and payment for the purchase on May 30, 1996 was due on June 28, 1996 because June 29, 1996, which would have been 30 days from the day of purchase was a Saturday, and as noted in Finding of Fact “4”, if the 30th day was a Saturday or Sunday, the due date for payment was the prior Friday. The due dates for purchases on June 13, 1996, June 21, 1996, and May 30, 1996 were July 12, 1996, July 19, 1996, and June 28, 1996, respectively, the Fridays before the 30th day which fell on a subsequent weekend day, i.e., Saturday, July 13, 1996; Sunday, July 21, 1996; and Saturday, June 29, 1996; respectively.

Proposed finding of fact 10 is accepted only in part because the Division’s witness testified that if the new procedures had been in effect, the surety would have “probably” paid the tax at issue. She testified that in her experience in certain situations the Division was unable to collect against a bond and had to go against a responsible officer or person. However, it is noted that the record contains no evidence that National Union Fire Insurance Company of Pittsburgh, Pennsylvania was insolvent or had ever failed to honor one of its surety bonds. The testimony of the Division’s witness that the surety would have “probably” paid the tax at issue was apparently

not based on any specific knowledge of difficulties with National Union Fire Insurance Company of Pittsburgh, but a matter of a careful witness not wanting to harm the Division's position in this litigation. Furthermore, as noted in Finding of Fact "8", the Division in its answer conceded that it could have collected the sales tax at issue from the bonding company within 30 days of the date that the notice of termination was issued.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner emphasizes that the Division has no right to hold a responsible officer or person liable for tobacco tax including the cigarette tax at issue in this matter, and, in a similar fashion, should not be permitted to hold a responsible officer or person liable for prepaid sales tax. Petitioner points out that the prepaid sales tax at issue was not sales tax collected from customers which should have been held in trust by a vendor. In the alternative, petitioner argues that he did everything in his power to be sure that the taxes at issue were paid, namely ensuring that a surety bond was properly in place. Therefore the failure to pay the prepaid sales tax at issue was not the result of Mr. Fleming's willful neglect, and he may not be held personally liable. Further, the actions of Marine Midland Bank in foreclosing on its loan barred petitioner from paying the taxes at issue because he had lost control over East Pittston Corp. Finally, the Division's failure to charge the taxes at issue against the surety bond "relieves Mr. Fleming of his obligation" (tr., p. 15).

19. The Division stresses that the record clearly supports a conclusion that petitioner was a responsible officer of East Pittston Corp. It contends that the corporation's liability for prepaid sales tax arose at the time the cigarette stamps were delivered to the corporation's place of business, which was "well in advance of the date that Marine Midland Bank took physical possession of the corporation's business premises" (Division's brief, p. 2). In the alternative,

according to the Division, liability for the tax at issue would have arisen at the time the corporation delivered stamped cigarettes to its retailer customers. Consequently, petitioner would be liable for all of the prepaid sales tax at issue under the first premise, or under the Division's alternative position, all of such tax less the prepaid sales tax included in the \$10,240.00 representing the value of cigarette stamps affixed to cigarettes which were repossessed by Marine Midland Bank (and had not been delivered to the company's retailer customers). Further, the Division maintains that the takeover by Marine Midland "was not a forceful foreclosure but rather a step taken with the acquiescence of the corporation" (Division's brief, p. 3). Finally, the Division contends that its erroneous cancellation of the surety bond did not affect petitioner's liability because the Division "was under no obligation to collect against it" (Division's brief, p. 4). Further, according to the Division, the bond was "essentially a contract between the State and the bonding company [and its cancellation did not have] any legal effect whatsoever upon the liabilities of the corporation or its officers" (Division's brief, p. 4).

CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect [sales] tax" as follows:

[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any *officer, director or employee* of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship *who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship* in complying with any requirement of this article; and any member of a partnership (emphasis added).

Tax Law § 1133(a) makes "every person required to collect any tax" personally liable for sales tax required to be collected.

B. As noted in Finding of Fact "15", petitioner had overall responsibility for East Pittston Corp. in his employee capacity as general manager. In fact, Mr. Fleming candidly conceded that

his responsibilities included “employees, buying, retailing, collection of receivables,” and that he was responsible for the purchase of cigarette stamps including authorizing the State of New York to make automatic withdrawals from the company’s bank account in payment of the cigarette stamps.

C. However, what is initially at issue is not whether petitioner was a responsible officer or person of East Pittston Corp. but rather whether a responsible officer or person may be liable for prepaid sales tax that, in fact, was not paid.

D. East Pittston Corp. was a wholesale dealer and distributor of cigarettes and other products to retailers. As a tax agent for the State, the company purchased and affixed cigarette stamps to packages of cigarettes in its inventory (*see*, Tax Law § 470[9]; 20 NYCRR 330.2[h][1]), which stamps evidenced payment of the cigarette tax and prepaid sales tax on such cigarettes (*see*, 20 NYCRR 334.2). The retailers paid the tax to East Pittston Corp. upon their subsequent purchase of the cigarettes from the company and, in turn, recouped the tax upon their sale of the cigarettes to their subsequent retail customers (*see*, Tax Law § 471[3]; 20 NYCRR 334.1[b][1],[2][i]). Pursuant to this statutory and regulatory format, East Pittston Corp. by possessing cigarettes for sale within the State became “liable for the collection and payment of the tax . . . and shall pay the tax . . . by purchasing stamps” (20 NYCRR 334.1[b][1]).

E. Tax Law § 1103 provides, in relevant part, as follows:

“(a)(1) Every cigarette agent shall pay, as a prepayment on account of the taxes imposed by [the Sales and Use Taxes article] . . . , a tax on cigarettes possessed for sale or use in this state and to which an agent is required to affix cigarette tax stamps under article twenty of this chapter, at the time that the agent is required to purchase and affix such stamps . . . and the provisions of such article twenty in relation to the use of stamps to evidence payment of the [cigarette] tax . . . shall be applicable to the prepayment imposed by this section

(2) The tax imposed by this section shall be paid at the same time and in the

same manner as the [cigarette] tax

* * *

(b) Except as otherwise provided in this section, the taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five [sales tax] and eleven hundred ten [compensating use tax] of this article. All the provisions of [the Sales and Use Taxes Article] relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in [the Sales and Use Taxes Article] and such modifications as may be necessary in order to adapt such language to the tax so imposed”

Moreover, Tax Law § 1145(e) specifically provides that any officer or employee of a corporation under a duty to act for such corporation “which fails to pay the tax required to be prepaid by . . . [Tax Law § 1103, Prepayment of sales tax on cigarettes, is] liable for a penalty equal to the total amount of the tax not paid.” This provision was added by Laws of 1995 (ch 2, § 64) and is applicable to the year at issue.

F. Petitioner has argued that there is no provision in the law that imposes personal liability for unpaid *cigarette tax* against a responsible officer or person. Therefore, according to petitioner, since *prepaid sales tax* is required to be paid at the same time and in the same manner as cigarette tax, a responsible officer or person may not be held personally liable for prepaid sales tax. This argument is rejected because it ignores (i) the explicit statutory language of Tax Law § 1145(e) noted above which specifically provides that any officer or employee of a corporation under a duty to act for such corporation which fails to pay the sales tax required to be prepaid is liable for a penalty equal to the total amount of the sales tax not paid, and (ii) Tax Law § 1103(b) which provides that “All the provisions of [the Sales and Use Taxes Article] relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to [the prepaid sales tax]. . . .” Tax Law § 1133(a), which makes “every

person required to collect any tax” personally liable for sales tax required to be collected, is clearly a provision of the Sales and Use Tax Article which relates to the collection of sales tax. Petitioner misinterprets the language in Tax Law § 1103(b) which provides for “such modifications as may be necessary in order to adapt such language [of the provisions of the Sales and Use Tax Article] to the [prepaid sales] tax so imposed. . . .” This language does not mean that Tax Law § 1133(a), which imposes personal liability on a responsible employee or officer, is not applicable to the prepaid sales tax. Petitioner has not introduced any legislative history that would support his interpretation which directly contradicts the explicit language of Tax Law 1145(e) as well as the language at the beginning of Tax Law § 1103(b) which provides that all of the provisions of the sales and use tax law “*shall apply*” to prepaid sales tax (*cf., Custom Shop Fifth Avenue v. Tribunal*, 195 AD2d 702, 600 NYS2d 295).

G. Consequently, whether petitioner was a responsible officer or person of East Pittston Corp. must be addressed. The determination of whether Mr. Fleming was a person under a duty to act for East Pittston Corp. is based upon an examination of the particular facts of this case. In *Matter of Moschetto* (Tax Appeals Tribunal, March 17, 1994), the Tribunal reaffirmed the standard articulated in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interests in the corporation (*Matter of Constantino, supra*).

H. Petitioner’s role as general manager of East Pittston Corp., as detailed in Finding of

Fact “15”, supports a conclusion that he had sufficient authority and control over the affairs of East Pittston Corp. to be considered a responsible officer or employee of the company. However, as noted in Finding of Fact “8”, East Pittston Corp. went out of business on June 28, 1996, and petitioner lost control over the affairs of the company to Marine Midland Bank which had foreclosed on its small business loan. As noted in Finding of Fact “4”, as of June 28, 1996, only two of the eight purchases of cigarette stamps had become due from East Pittston Corp. under the credit arrangement the company had with the Division. Consequently, it is concluded that petitioner did not have sufficient authority and control to ensure payment of the taxes at issue for which payment became due after June 28, 1996. The Division’s argument that the company’s liability for the taxes at issue arose at the time the cigarette stamps were delivered to the place of business of East Pittston Corp., or, in the alternative, at the time the corporation delivered stamped cigarettes to its retailer customers does not alter this conclusion. The Division’s argument ignores the crucial fact that the corporation had an arrangement with it to purchase the stamps on credit, with payment due 30 days after purchase. Therefore, the relevant dates for analyzing whether petitioner had sufficient authority and control to pay the taxes on behalf of the corporation are the payment due dates, which for six of the eight purchases of cigarette stamps at issue, were after June 28, 1996, as noted in Finding of Fact “4”. The Division is correct that the sales tax is a transaction tax and that liability for sales tax arises when the sales occurred (*see, e.g., Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, June 29, 1989). However, cases like *BAP Appliance Corp.* may be distinguished based on the pivotal fact in this matter that the Division had allowed East Pittston Corp. to purchase cigarette stamps on credit (*cf., Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990 [wherein the Tribunal noted that although the general rule was that liability for sales taxes due is fixed from the time the taxes are to be

collected, liability for such taxes did not lie against a responsible person or officer who was prevented from carrying out his responsibility to remit the taxes]).

I. Moreover, pursuant to Tax Law § 1145(e), the imposition of prepaid sales tax against petitioner as a responsible person or officer is properly remitted if the failure to pay the prepaid sales tax resulted from reasonable cause and was not due to willful neglect (*cf., Matter of Unger*, Tax Appeals Tribunal, March 24, 1994 [wherein the Tribunal observed that the liability of a responsible person or officer for sales tax, which is in contrast to the prepaid sales tax at issue here, does not require that the person's failure be "willful"])). In the situation at hand, petitioner acted reasonably in waiting 30 days to make payment for the prepaid taxes in light of the company's arrangement to purchase cigarette stamps on credit. Further, as noted in Finding of Fact "15", East Pittston Corp., even at the end of its operations, had assets which petitioner reasonably believed would be sufficient to pay the taxes due. Most important, petitioner had ensured that the company's surety bond was in place and would cover the taxes due (*cf., Matter of Russack*, Tax Appeals Tribunal, February 8, 1996). In other words, petitioner paid attention to whether the prepaid sales tax obligations of the corporation were being met. Petitioner's situation "is very different from those cases where the officer simply chose not to pay attention to whether the sales tax obligations . . . were being met" (*Matter of Russack, supra*). But for the Division's erroneous cancellation of the surety bond, the taxes would have been paid. The record contains no evidence that National Union Fire Insurance Company of Pittsburgh would not have honored its commitment as surety. In light of these circumstances, it is concluded that the failure of petitioner as a responsible person or officer of East Pittston Corp. to pay the prepaid sales tax at issue was due to reasonable cause and not willful neglect.

J. In light of the above analysis, the issues designated "II" and "III" at the beginning of this

determination are rendered moot.

K. The petitioner of Edward J. Fleming is granted, and the Notice of Determination dated November 8, 1996 is cancelled.

DATED: Troy, New York
August 27, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE